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No. 937

In the

Supreme Court of the United States

OCTOBER TERM, 1957

LECUNO OIL COMPANY,
Petitioner,

against

T. P. SMITH, JR., Individually and as Trustee, HAZEL COCKE JOBE and Husband, CLEVE B. JOBE, CAL COCKE TRAMMELL, and WINSTON TAYLOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas entered on September 26, 1957. (R. 10.)*

OPINIONS BELOW

The judgment of the 71st District Court of Harrison County, Texas, is contained on Page 133 of the Transcript

*References marked "R" are to the Certified Record.

of the proceedings of the trial Court which is produced at page 1 of the Certified Record.

The opinion of the Court of Civil Appeals is reported at *306 S. W. 2d 190*, and is printed in the Appendix at Page 4.

The order of the Supreme Court of the State of Texas denying rehearing on its order refusing to grant a Writ of Error to the Court of Civil Appeals is unreported and printed in the Certified Record at Page 20 .

JURISDICTION

The judgment of the Court of Civil Appeals, affirming the judgment of the District Court was entered September 26, 1957. (R. 10.) Rehearing was denied October 24, 1957. (R. 12). Application for Writ of Error in the Supreme Court of Texas was refused January 15, 1958. (R. 20.) Rehearing was denied February 26, 1958 (R. 20.)

The jurisdiction of the Court is invoked under *28 U. S. C., Sec. 1257(3).*

The federal questions in this cause pertaining to rulings of the Office of Price Stabilization and the Federal Power Commission were raised seasonably in the lower courts as shown by the following statement of the Court of Civil Appeals, *Lecuno Oil Co. v. Smith, et al., 306 S. W. 2d 190*, at page 191-192:

> " * * * The defendants *(Petitioner here)* responded by motions to abate the suit for want of necessary parties and failure of appellees to exhaust their administrative remedies before the Federal Power Com-

mission. These motions were overruled. In an original and later an amended answer, appellants *(Petitioners here)* pled defensively that the subject-matter of controversy was within the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U. S. C. A. Sec. 717 et seq., and that all rates, charges and field prices or changes therein for the royalty gas must be set by that agency. Answering further, it was alleged that during a part of the time since production another Federal Agency, the Office of Price Stabilization, had controlled the field price of gas produced under the leases involved, and had set a price of 10¢ per MCF at the wellhead and that appellees having been paid the 10¢ ceiling price, they could not come back after the expiration of the law creating the Office of Price Stabilization and sue for a greater price than had been set. For further answer, the appellant denied all the allegations of plaintiffs' petition, though it admitted it had taken gas from the wells sued upon by appellees from unitized acreage under the rules and regulations of the Railroad Commission, but insisted that appellant had paid all the royalties due to the appellees. Attached to the answer as an exhibit is the order of the Director of the Office of Price Stabilization and orders of the Federal Power Commission, relied upon by appellant * * *."

In the trial of this cause, the Trial Court repeatedly overruled the petitioner's attempts to introduce evidence in support of its contention that certain rulings of the two federal agencies in question were a bar to Respondent's suit. These points were appropriately carried forward to the Court of Civil Appeals and overruled. The Supreme Court of Texas refused a Writ of Error thereby necessitating a Petition for a Writ of Certiorari by this Court to the Court of Civil Appeals at Texarkana, Texas.

QUESTIONS PRESENTED

(1) Whether a trial court can refuse to take judicial notice of the rules and regulations promulgated by the Administrator of the Office of Price Stabilization, which rulings were properly contained in the Federal Register, despite the express provisions of *44 U. S. C., Sec. 307* that " * * * The contents of the Federal Register shall be judicially noticed * * *."

(2) Whether a trial court can exclude from evidence, upon the grounds of hearsay and irrelevancy, the actions taken by the Administrator of the Office of Price Stabilization in establishing a maximum price to be paid for gas produced in a certain field and establishing the costs in making this gas available to the nearest market, in an action between a royalty owner and the producer as to the amount of royalty to be paid to said royalty holder upon this gas.

(3) Whether a court may enter a judgment after the termination of the Office of Price Stabilization, which judgment allows to the complainant the difference between the ceiling price established by the Office of Price Stabilization and the price the complainant could have received except for the lawful and necessary intervention of the Office of Price Stabilization under an act of Congress.

(4) Whether a purchaser of natural gas may be required to pay a price retroactively in excess of the ceiling price placed upon such gas by the Office of Price Stabilization during its existence, after the expiration of the act of Congress creating such agency.

(5) Whether a royalty holder who is dissatisfied with the rate schedules filed with and approved by the Federal Power Commission, which includes the producer's allowable costs of transporting the gas to the nearest market, can file a suit to determine the allowable costs of transporting the gas to market without first exhausting the remedies of review provided for by the Federal Power Commission.

(6) Whether in a suit between a royalty holder and producer, a trial court can exclude from evidence, upon the grounds of hearsay and irrelevancy, the actions of the Federal Power Commission in approving the charge of transporting gas to be used in Interstate Commerce to the nearest market which charge was filed by the producer as part of his rate schedule, where the issue before the court is the proper charge for said transportation.

(7) Whether a purchaser of natural gas can be required to pay a price in excess of that price frozen by the Orders of the Federal Power Commission by its orders 174, 174a, and 174b, upon the ground that such orders are hearsay and irrelevant in a proceeding involving the costs of transportation of natural gas into Interstate Commerce.

The Petitioner furthermore, adopts all points of error asserted in its application for Writ of Error to the Supreme Court of Texas, which this Honorable Court will be incidentally concerned with if this Petition for Certiorari is granted.

STATUTES AND REGULATIONS INVOLVED HEREIN

I

44 U. S. C., Sec. 307, as follows:

"No document required under Section 305(a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in Section 302 of this title; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under Section 305 of this title, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. *The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.* (July 26, 1935, c. 417, Sec. 7, 49 Stat. 502.)"

II

Defense Production Act of 1950, 50 U. S. C. App., Sec. 2108(e)(iii), as follows:

"* * * Except as provided in this subsection, the pendency of any protest under section 407 of this title

(Section 2107 of this Appendix), or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 409 or 706 of this Act (Section 2109 or 2156 of this Appendix) or section 371 of Title 18; *nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under this title (Sections 2101-2110 of this Appendix).*" *Sept. 8, 1950, c. 932, Title IV, Sec. 408, 64 Stat. 808.*

III

The rulings and regulations of the Office of Price Stabilization and the Federal Power Commission pertinent hereto are set out in the Appendix, pages 17 et. seq.

STATEMENT OF THE NATURE AND RESULT OF THE CASE

The Respondents filed this suit against the Petitioner in April, 1954, alleging that the Petitioner had failed and refused to account to the Respondents for the full amount of royalties under oil, gas and mineral leases in Harrison County, Texas. The Respondents filed a supplemental petition in January, 1956, wherein they alleged that the Petitioner had deducted 2¢ per MCF from the price of the gas sold and had thus failed to account for the full one-eighth (1/8) of the royalty which the Respondents were due to collect under their oil, gas and mineral leases. The 2¢ was claimed by the Petitioner to be the actual cost of transporting, processing and delivery of gas shipped in interstate commerce because the gas could not be sold at the wellhead. The Petitioner filed a plea in abatement praying

the Court to abate the suit because the Respondents had not exhausted their administrative remedies before the Federal Power Commission, and that the Federal Power Commission had accepted the rate of 2½¢ as a proper charge for transportation, gathering and delivery of the gas, and further that the Respondents would have to first apply to the Federal Power Commission for relief before filing the suit. (R. 1, pp. 10, 17.) This plea in abatement was overruled (R. 1, p. 26). The Petitioner then answered that the Respondents could not maintain their suit because, under the Natural Gas Act of the United States, all rates, charges and field prices, as well as transportation charges, for gas sold to be shipped in interstate commerce were within the exclusive jurisdiction of the Federal Power Commission, and that the Respondents had not exhausted their administrative remedies. This plea in abatement was overruled and the Petitioner further answered that the Office of Price Stabilization of the United States, acting in accordance with authority granted by the Congress, had set a price of 10¢ at the wellhead; and, that, Respondents having admitted they had been paid the 10¢ ceiling price, they could not now come back (after the expiration of the Office of Price Stabilization) and sue for a greater price than the Office of Price Stabilization had set. (R. 1, p. 29.)

The Petitioner further denied all of the allegations of Respondents' petition though it admitted that it had taken gas from the wells sued upon by Respondents from unitized acreage under the rules and regulations of the Railroad Commission, but that Petitioner had paid all of the royal-

ties due under the oil, gas and mineral leases to the Respondents; that it had paid the price fixed by the Office of Price Stabilization, and had charged the transportation costs, processing costs and delivery costs approved by the Federal Power Commission. It attached to and made a part of its answer the order of the Director of the Office of Price Stabilization of the United States, fixing the ten-cent maximum price and the orders of the Federal Power Commission, freezing all prices for transportation, processing and delivery, as issued in June, 1954. However, during trial, the trial court repeatedly prevented any efforts by the Petitioner to introduce any evidence in support of its contention that the actions of the Office of Price Stabilization and Federal Power Commission were a bar to their suit (R. 2, pp. 91-141.)

In addition to the answer, the Petitioner filed a cross-action, to construe the leases in question and also the division orders, but the errors in this regard are not directly the concern of this Honorable Court.

There was no dispute between the parties as to the charge of one fourth (¼) cent for dehydration of the gas; all admitting and agreeing that this charge was proper under the contract and circumstances. (See Court of Civil Appeals Opinion, p. 5, R. 9.)

The Trial Court refused to grant the Petitioner any relief on its cross-action but, upon a trial, submitted to the jury the issue as to the reasonable cost of transporting, processing and delivery of the gas, and an issue as to whether

the Respondents had been paid one-eighth (1/8) of the market value at the well among other issues. (R. 2.) Following the verdict of the jury, the Petitioner filed a motion for judgment, which was refused by the Court and the Court granted the motion of Respondents for judgment. Motions for a new trial were timely filed and overruled. Appeal was then duly perfected by Petitioner to the Court of Civil Appeals at Texarkana, Texas, whereupon judgment of the trial court was reformed and affirmed. The Petitioner thereupon, filed its Application for Writ of Error to the Supreme Court of Texas which was denied, as was Petitioner's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

There has never been an instance in Petitioner's knowledge where a court has excluded consideration of the duly promulgated rulings and actions of a Federal Administrative Agency upon the absurd grounds that such rulings and actions were hearsay to an affected party, and irrelevant to be considered in an action directly concerned with the subject matter acted upon by the Federal agency in question. The trial court refused to take judicial knowledge of the orders of the Office of Price Stabilization! This point is so elementary, the Petitioner hesitates to burden this court with authorities. In the Trial Court in this matter the Petitioner plead the rulings of the Office of Price Stabilization and sought to introduce the rulings into evidence. Furthermore, the Petitioner sought to elicit the fact that the Office of Price Stabilization had acted in putting a

ceiling price on the gas in question. However, on each and every occasion the Trial Court held that the actions of the Administrator were hearsay to the Respondents. (R. 2, pp. 91-141.)

Not only were the original orders of the Administrator admissible, but the court had to take judicial notice of these rulings and regulations. *44 U. S. C., Sec. 307* expressly states:

> "No document required under section 305(a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 302 of this title; and, unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this title, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. *The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly issued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.* (July 26, 1935, c. 417, & 7, 49 Stat. 502.)" (Emphasis added.)

Therefore, the Petitioner submits that the error of the Trial Court in holding that the orders of the Administrator of the Office of Price Stabilization were hearsay and irrelevant as to the Respondents on a point directly passed upon by the Administrator, and furthermore, in ignoring the express provisions of *44 U. S. C., Sec. 307*, requiring judicial notice of said acts, are justifiable reasons for this court to grant a Writ of Certiorari in this cause.

II.

The Trial Court below very strangely and absurdly ruled that the actions of the Administrator of the Office of Price Stabilization, acting under authorization by the Congress and President of the United States, in setting a ceiling price on the gas upon which the Respondents' royalties were based, were hearsay and irrelevant to the Respondents in a suit for an accounting for royalty based upon a price in excess of said ceiling. Surely the actions of Federal agencies are not hearsay as to the regulated public! To so hold would be analogous to a holding that a taxpayer can refuse to be bound by the income tax rules and regulations promulgated by the Treasury Department upon the grounds of hearsay. This principle is too elementary for dispute. The acts of the Legislative, Executive and Administrative branches of the government cannot be hearsay in a suit directly involving the subject-matter acted upon by the particular governmental body since they are operative acts of law.

III.

In this cause the courts below rendered a judgment retroactively for the Respondents for a period of time during which the Congress of the United States had set up an administrative agency to establish a ceiling on the price to be paid for gas in the Wascom Field in Texas and also to freeze the amount to be charged for the transporting, compressing and dehydration of this gas at the nearest market. The judgment in question was rendered after the act creating the Office of Price Stabilization terminated and was for the difference between the ceiling price set by the Office of Price Stabilization, and paid by the purchaser, and the amount the Respondents claimed they should have received.

The Defense Production Act of 1950, as amended, *Title 50 U. S. C. A. Appendix, Sec. 2108* expressly provides:

> "• • • except as provided in this subsection, *no retroactive affect shall be given to any judgment* setting aside a provision of a regulation or order issued under this title." (Emphasis added.)

In *Stanolind Oil & Gas Co. v. Freehill, 205 F. 2d 305 (Em. App. 1953)*, the Stanolind Oil Company, et al., sued the Director of Price Stabilization to set aside an order fixing the price of gas in the Woodlawn Field in Texas (an adjoining field to the one in the case at bar), at 10¢ M. C. F. after the Office of Price Stabilization had terminated. Stanolind's object was to invalidate the ceiling price on the gas in question retroactively so it could recover the difference between the ceiling price set by the Office of Price Stabilization and the price set out in a contract of

sale with the Mississippi River Fuel Co., which contract price was 12¢ per M. C. F. during the existence of the Office of Price Stabilization. The Court held, inter alia, that by reason of the provisions of Sec. 408(d)(2) of the Defense Production Act of 1950, as amended, *Title 50 U. S. C., Appendix Sec. 2108*, prohibiting retroactive effect when an order of the Office of Price Stabilization ceases to be, that Stanolind could not maintain this suit. See also *Atlantic Meat Co. v. Porter, 155 F. 2d 537 (Em. App. 1946); Schwartz v. Clark, 163 F. 2d 751 (Em. App. 1947); Talbot v. Woods, 164 F. 2d 493 (Em. App. 1947); Colonial Village Apts. v. Henderson, 202 F. 2d 156 (Em. App. 1953)*. All of these cases succinctly illustrate that the provisions of the Defense Production Act under which the Office of Price Stabilization was created were not intended to be retroactive in any respect except for criminal violations. Judge Magruder in *Standard Kosher Poultry v. Clark, 163 F. 2d 430 (Em. App. 1947)*, concisely stated the logical reason why the judgment of the court in the case at bar is a gross violation of the Statutes above referred to: (page 432)

> "It would be an odd thing if a judgment of this court rendered after the general termination of the act were to be given greater effect than if the judgment had been rendered before."

This court should bear in mind that the judgment complained of could not have been entered during the pendency of the Office of Price Stabilization. How can such a judgment now be justified after the expiration of said agency? This Petitioner submits that this Court should grant the Writ of Certiorari as prayed for herein so as to

correct this illogical interpretation of the Defense Production Act of 1950 which allows the Respondents to compel the Petitioner to violate a law of the United States.

IV.

The Petitioner plead and attempted to prove that the contract of sale for the gas in question was filed under the rules of the Federal Power Commission and became a rate schedule; and furthermore, that the Respondents had not applied to the Federal Power Commission for relief. The Petitioner had included within said rate schedules, as filed, 2¼¢ for transporting, handling and compressing of the gas. Therefore, under the Rules of the Federal Power Commission, Petitioner was unable to change the rates, charges for transportation and service, without a Commission Order, and since the respondents had not complained to the Federal Power Commission, though the order of the Commission froze the rates as of June, 1954, the Respondents' suit was premature. Upon hearing the petitioner introduced the certificate of convenience and necessity (R. 2). The petitioner offered in evidence the orders of the Federal Power Commission, freezing all *charges* and *prices*, being Orders Nos. 174, 174-A and 174-B. (Appendix, pages 28, et. seq.)

In the application for the certificate of convenience and necessity as required by Orders Nos. 174, 174-A and 174-B of the Federal Power Commission, the petitioner was required to file said application for certificate of public convenience and necessity, in which application it was shown that a charge of .0225¢ or 2¼¢ was being charged

for gathering, compressing, processing and delivery of the gas.

It was shown on the last page of the exhibit that the "value fixed on the gas by the State of Texas for assessment of the production tax .0225, being allowed for gathering, compressing and dehydrating." Attached to the rate schedule as filed under the compulsion of the orders of the Federal Power Commission and in the letter of transmittal (R. 1, Tr., Vol. 2, p. 15, Petitioner's Exhibit No. 50), there was attached a bill showing that .0225¢ was being charged for gathering, compressing and dehydrating of the gas. This was received by the Federal Power Commission as the rate schedule.

Then, in the application for change in rate schedules (Petitioner's Exhibits 13 and 14), it was shown:

> "That .0225¢, being allowed for gathering, compressing and dehydrating."

It was likewise shown in a sample billing which was attached to the application for increase that .0225¢ was being charged for transporting, dehydrating and compressing the gas; thus, this entire rate of .0225¢ had been filed and accepted by the Federal Power Commission.

The Petitioner offered the letters from the Federal Power Commission, showing that the rate schedules had been filed by the petitioner and accepted by the Federal Power Commission.

It is a well settled rule of administrative law that where an administrative agency has jurisdiction and has acted on a particular object, a complainant must first exhaust

all of his remedies before such agency before he can get a judicial review. *F. P. C. v. Union Producing Co., 230 F. 2d 36 (D. C. Cir. 1955), cert. den., 351 U. S. 97; Union Oil Co. v. F. P. C., 236 F. 2d 816 (D. C. Cir., 1956); Petersen Baking Co. v. Bryan, 290 U. S. 570 (1934).* The cases argue the point to its conclusion that where Congress steps in a particular area and creates an administrative agency, the courts must await final decision by the agency. This is so for two reasons: (1) it brings unformity of decision; and (2) it gives the court the benefit of expert opinion of the men whose business it is to understand the operation, the transportation and delivery of gas in the United States. The Petitioner did not want to file schedules! The Petitioner did not want to file its rates and its records of business; neither did Petitioner want the price frozen which it charged for transportation, processing and delivery of the gas! The orders of the Federal Power Commission made it necessary for the Petitioner to comply; yet the lower courts by their judgments will compel the Petitioner to violate the rules of the Federal Power Commission which forbid any rate or price increases without prior approval. The Respondents should first be required to exhaust their remedies before the Federal Power Commission. If this court does not require the Respondents to exhaust their remedies, then the courts of all of the states shall have equal power with the Federal Power Commission to pass on the rates and charges of oil and gas. The Federal Power Commission will not have exclusive jurisdiction to pass on the problems for which it was set up for. We shall

then have a body of laws from the Federal Power Commission and federal courts and a body of laws from intervening state courts. Such a result should be prevented by this court by the granting of a writ of certiorari.

V.

As shown above, the Federal Power Commission has accepted the charges made by the Petitioner for transporting and processing the gas to market. The trial Court excluded any mention of the actions of the Federal Power Commission upon the issues before the court upon the grounds of hearsay and irrelevancy. As pointed out in ground I., *supra*, such a holding is completely absurd. The actions of an administrative agency cannot be hearsay!

The Federal Power Commission froze the price to be paid for all gas in all of the fields of Texas by its Orders No. 174 *et. seq.*, above referred to and as fully shown in the Appendix. By the judgment complained of, and the orders of the State Court, the Petitioner will be required to pay 3½¢ per thousand cubic feet (M. C. F.) *more than the price frozen by the Federal Power Commission.* If the Petitioner pays such judgment, the Federal Power Commission can forfeit its certificate and take away its right to transact business! If it does not pay the State Judgment, the Respondents will levy upon and sell its property under execution! What recourse can petitioner have unless this Court grants a Writ of Certiorari? Where are its rights to be protected?

It is obvious that the Courts in this case have shown a broad lack of familiarity with federal administrative law,

or further, that they have decided that federal administrative agencies should neither control the price of gas in Texas, nor regulate the cost of the interstate transportation of natural gas in Texas. Where can a producer-purchaser get relief? Hundreds of such cases will arise from "Pandora's Box" if this decision is not revised and the obvious errors corrected that affect the laws of the land.

We respectfully pray the Court to grant Certiorari, summarily reversing this cause and remanding it to the District Court of Harrison County, Texas, or reverse and render judgment for the petitioner; alternatively, to grant the Writ of Certiorari and set the matter down for a hearing upon the merits.

CONCLUSION

For the foregoing reasons, this Petitioner for Writ of Certiorari should be granted, and the judgment below summarily reversed and remanded for a new trial, or be reversed and rendered for Petitioner, or alternatively to grant the writ of certiorari and set the matter down for a hearing upon the merits.

Respectfully submitted,

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April 18, 1958